IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

No. 408

FELIX K. WAGONER, JACK R. WAGONER, DONALD L. WAGONER and HOWARD R. WAGONER, co-partners, doing business under the firm name of STYLE WAGONER CONSTRUCTION COMPANY,

*Petitioners,*

*vs.*

CONSOLIDATED FAIRVIEW SCHOOL DISTRICT NO. 5, GEORGE SAWHILL, CHARLES WILLIAMS, 1ST DOE, 2ND DOE,

*Respondents.*

## Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.


ROBERT W. FRASER,
433 West Eighth Street,
Santa Ana, California,
*Attorney for Petitioners.*

*Of Counsel:*

OTIS BABCOCK,
1241 ½ South Main Street,
Santa Ana, California.

ISAAC WILLSON,
433 Majestic Building,
Denver, Colorado.


Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

## SUBJECT INDEX


PAGE

Opinions below ..... 1

Statement of grounds on which jurisdiction of this court is invoked ..... 2

Questions presented ..... 2

Statutes, Regulations and Rules involved ..... 2

Statement of the case ..... 2

Argument ..... 4

Reasons for granting the writ ..... 10

Appendix:

Appendix A. Opinion of the United States Court of Appeals ..... App. p. 1

Exhibit "A." Designation of Record on Appeal ..... App. p. 3

Exhibit "B." Notice of Intention to Move for a New Trial and of Intention to Move for an Order to Alter or Amend Judgment ..... App. p. 4

Exhibit "C." Motion for New Trial and to Amend or Alter Judgment ..... App. p. 6

Exhibit "D." Letter to Honorable Presiding Justice and Associate Justices by Counsel for Petitioners dated March 25, 1961 ..... App. p. 8

## TABLE OF AUTHORITIES CITED


| Cases | PAGE |
|---|---|
| Melvin v. Carl, 206 Cal. 772, 276 Pac. 574 | 9 |
| Weyerhauser Steamship Company, 274 F. 2d 274 | 6 |
| **Rules** | |
| Federal Rules of Civil Procedure, Rule 8(f) | 2, 10 |
| Federal Rules of Civil Procedure, Rule 59(b) | 2, 10 |
| Federal Rules of Civil Procedure, Rule 73(a) | 2, 10 |
| Federal Rules of Civil Procedure, Rule 75(g) | 2, 6 |
| Federal Rules of Civil Procedure, Rule 75(h) | 2, 5 |
| Revised Rules of the United States Supreme Court, Rule 19(b) | 2 |
| **Statutes** | |
| United States Code, Title 28, Sec. 1254(1) | 2 |
| **Textbooks** | |
| 5 Corpus Juris Secundum, Sec. 1353, p. 401 | 5 |
| 5 Corpus Juris Secundum, Sec. 1356, p. 433 | 5 |
| 66 Corpus Juris Secundum, Sec. 134, p. 369 | 9 |
| 66 Corpus Juris Secundum, Sec. 139, p. 373 | 4 |
| 92 Corpus Juris Secundum, p. 1068 | 9 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

FRED K. WAGONER, JACK R. WAGONER, DONALD L. WAGONER and HOWARD R. WAGONER, co-partners, doing business under the firm name of STYLE WAGONER CONSTRUCTION COMPANY,

*Petitioners,*

*vs.*

CONSOLIDATED FAIRVIEW SCHOOL DISTRICT NO. 5, GEORGE SAWHILL, CHARLES WILLIAMS, 1ST DOE, 2ND DOE,

*Respondents.*

## Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

*To the Honorable Chief Justice and Associate Justices of the Supreme Court:*

Your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Tenth Circuit.

### Opinions Below.

The opinion of the Court of Appeals was filed April 18, 1961, reported in 289 Fed. Rep. 2d (3 Supp.) 480.

The opinion of the District Court was not reported.

## Statement of Grounds on Which Jurisdiction of This Court Is Invoked.

Jurisdiction to review this case upon Writ of Certiorari is conferred upon this Court by 28 U. S. C. Sec. 1254(1), and Rule 19(b) revised rules of the Supreme Court.

## Questions Presented.

(1) May a notice of intention to move for a trial stating the grounds therefore, filed within ten days from the entry of judgment and treated by all parties as a motion for a new trial, although wrongly labelled, rob a Court of Appeals of jurisdiction to entertain an appeal on the ground that a motion for a new trial had not been timely filed?

(2) May a Court of Appeal determine the question of jurisdiction to hear an appeal if a proper suggestion has been made to said Court that records material to a party were omitted from the record on appeal and were not before the court?

## Statutes, Regulations and Rules Involved.

Rules 8(f), 59(b), 73(a), 75(g), and 75(h), F. R. Civ. Proc. Rule 19(b) revised, Supreme Court Rules.

## Statement of the Case.

On the 7th day of August 1960, the District Court made and entered its order denying the motion for a new trial.

On September 3, 1960, petitioners filed a notice of appeal.

The United States Court of Appeals, in dismissing the action for lack of jurisdiction said in its opinion, page 2, Appendix (a):

> "Rule 59 (b) F. R. Civ. P. states that 'a motion for a new trial shall be served not later than ten days after the entry of the judgment' and, Rule 73 (a) states that a notice of appeal shall be filed within thirty days from the entry of the judgment or within thirty days from an order denying a motion for a new trial. And, a timely notice of appeal is a jurisdictional prerequisite. . . . Here the notice of appeal was filed within thirty days from the denial of the motion for a new trial, but since the motion for a new trial was untimely, it did not extend the time for taking the appeal."

In the proceedings in the District Court, the point was never raised that the motion for a new trial had not been given within the time required by law. For this reason, petitioners, in their designation of record on appeal, Exhibit "A" did not ask to have included therein, the notice of intention to move for a new trial Exhibit "B" or of its formal motion for a new trial Exhibit "C" and *the amendment to its notice of intention to move for a new trial.*

During the oral hearing on appeal before the Court of Appeals, the latter indicated that it did not have jurisdiction because a motion for a new trial was not timely made and therefore, it did not extend the time within which to perfect an appeal.

On March 25, 1961 there was mailed to the Justices of the United States Court of Appeals, Tenth District, from Santa Ana, California, by counsel for petitioners a letter, duly served, Exhibit "D," calling to

the attention of the Court that the designation of record to be used on appeal did not include the notice of intention to move for a new trial nor the motion for a new trial and the amendment to its notice of intention to move for a new trial, for the reason that there never was any claim by appellees and respondents that a proper and timely motion for a new trial had not been made and requesting the Court for permission to augment the record to include these documents.

This request was not granted and therefore those documents were not before the Court of Appeals when it determined the question of jurisdiction.

**Argument.**

We believe the Court of Appeals was in error in dismissing this action for want of jurisdiction for the following reasons:

(1) The notice of intention to move for a new trial filed herein was, in fact, a motion for a new trial.

> "The nature of a motion as constituting a motion for a new trial is not determined by the pleader's description but by the intrinsic contentions of the motion, its recitation of fact, the nature of the wrong sought to be corrected and the quality of the remedy sought to be invoked." 66 C. J. S., Sec. 139, p. 373.
>
> "It has been held that a notice of intention to move for a new trial, setting out grounds relied on—and treated as a motion for a new trial by both parties may be considered as a motion for a new trial." 66 C. J. S., Sec. 139, p. 373.

The weight of authority is, we believe, that informally drawn papers and improperly labeled documents may be sufficient to accomplish the apparent objective of taking an appeal or of making a motion for a new trial.

> "Appeals will not be dismissed on mere technicalities—but only for reason or on substantial grounds." 5 C. J. S., Sec. 1353, p. 401.

> "The failure to file, or to give notice of, or serve a statement, on, a motion for a new trial generally is not a ground for dismissal of an appeal." 5 C. J. S., Sec. 1356, p. 433.

(2) There was error in refusing to permit petitioners to augment the record on appeal to include the notice of intention to move for a new trial, the amendment thereof, and the formal motion for a new trial so that these documents could have been before the Court for consideration on the question of jurisdiction.

Rule 75(h) F. R. Civ. Proc. provides in part —

> ". . . if anything material to either party is omitted from the record on appeal by error or accident . . . the appellate court, on a proper suggestion . . . may direct that the omission . . . shall be corrected and if necessary, that the supplementary records shall be transmitted by the clerk of the district court."

Although, as heretofore stated, the designation of record on appeal, Exhibit "A," did not request the motion for a new trial to be a part of the record on appeal, the Clerk made a note, page 11, Transcript of Record, "A motion for a new trial and to amend or alter judgment was filed August 11, 1960."

This document had not been requested for the record because the timeliness for the motion for a new trial had never been an issue in this case.

Under these circumstances, we feel that the Court of Appeals was in error because it permitted the District Court to prepare the record on appeal which really did not reflect what had occurred.

Rule 75(g) F. R. Civ. Proc. provides in part that the clerk of the district court

> ". . . shall transmit to the appellate court a true copy of the matter designated by the parties, but shall always include, whether designated or not designated, copies of the following: the material pleadings without unnecessary duplication. . . ."

We believe that that rule was enunciated for circumstances similar to those in this case.

We further believe, that had all of these documents been before the Appellate Court, that it would have accepted jurisdiction because informally drawn papers and improperly labeled documents may be sufficient to accomplish the apparent objective of taking an appeal or of making a new trial.

In the recent case of *Weyerhauser Steamship Company*, 274 F. 2d 274, the facts were: Judgment was filed on November 2, 1956; on November 5, 1956, appellant filed "a motion for an extention of time within which to file a motion for a new trial." This was supported by an affidavit and the Court made its order

extending the time to November 20, 1956, page 276; on November 20th, the appellant filed a motion for a new trial; on December 5th, a formal order denying a new trial was entered and on December 19, 1956, appellant filed notice of appeal, page 277. The court, in holding that the appeal was timely taken, said:

> "It is true that a formal motion for a new trial here was not made until November 20th, 1956. Prior to that time, however, the appellant filed papers set forth in Footnote 2, supra. In these, he moved the Court for an order 'extending to and including November 20th, 1956 within which to file a motion for a new trial. . . .' Of course no grounds for the anticipated motion for a new trial are stated although the affidavit in support thereof suggested that counsel expected his motion to be based upon some matter relating to the Court's instructions, top p. 282 . . . there is considerable body of authority indicating that in determining whether an attempted appeal has been accomplished, most informally drawn papers and improperly labeled documents have been held sufficient to accomplish the apparent objective of taking an appeal or of making a motion for a new trial. Thus, a petition for rehearing has been held equivalent to a motion for a new trial. Fraser v. Doing, 76 U. S. App. D.C. 111, 130 Fed. 2d, 617; The Astorian, 9 Cir., 57 F. 2d 85, 87; a waiver of a notice of appeal, when filed, has been an acceptable substitute for a regular notice of appeal. Crump v. Hill, 5 Cir., 104 Fed. 2d, 36. . . .

"Our decision of Mondakato Gas Company v. Montana-Dakota Utilities Company, 194 Fed. 2d, 705, 706, is out of line with these cases but it was expressly disapproved in Parissi v. Telchron Inc., 349 U.S. 46, 47, 75 S. Ct., 577 . . . p. 282, it might well have been noted that the decisions we have just mentioned . . . decisions holding that an attempted appeal may be held to be effective and timely notwithstanding the papers filed are given the wrong names, do not use the word 'appeal,' are filed in the wrong court, and otherwise fail to strictly conform to the language and other rules. Those cases would support the holding that the motion filed November 5th, 1956 could be treated as a motion for a new trial even if it was not labeled as such, and failed to state the grounds for the intended motion. Thus, it might satisfy the requirements of Rule 59 (b) relating to service of motion later than ten days after entry of judgment. Under such a holding, that motion would suspend the running of the time for appeal under the provisions of Rule 73 (a), top of page 283.

"If the motion filed November 5th, may properly be treated itself as a motion for a new trial, the question arises as to what effect, if any, must be given the formal motion for a new trial of November 20th, 1956. It may be considered an attempted amendment or enlargement of the earlier motion. Of course, . . . as suggested by our decisions in the Thomas Day v. Doble Laboratories and the Astorian, supra, the motion though still ineffective was not necessarily non-existent. *This*

*means that when the formal motion was denied on December 5th, 1950, this was the date of the denial from which time the thirty days would be computed, making the December 17th* notice of appeal timely." Bottom pages 283, 284 . . . (emphasis ours).

In the case of *Melvin v. Carl*, the Supreme Court of California said:

"Yet so far as we have been able to ascertain, it has never been held that a defective or informal notice has had the effect of depriving the party intending, as here, in good faith to move for a new trial, of the right to delay the filing of his notice of appeal until after the termination of the new proceedings." *Melvin v. Carl*, 206 Cal. 772, 774, 276 Pac. 574, 575.

Furthermore, if the respondents had the right to raise the point that a motion for a new trial was not timely filed, they waived such right.

"Since an application for a new trial, or of intention to apply therefore is for the benefit of the party to whom it is required to be given, it is generally held that he may waive such notice or defects in it or in the service thereof or prematureness or delay in serving or filing it." 66 C. J. S., Sec. 134, p. 369.

"As a general rule, rights relative to procedure and remedy are subject to waiver." 92 C. J. S., p. 1068.

## Reasons for Granting the Writ.

Surely, it must be conceded that in this case, no one was mislead and that an attempted appeal was made in good faith. We earnestly urge that the circumstances of this case fully warrant the intervention of this Court so that there may be uniformity of decisions concerning requirements of Rules 59(b) and 73(a).

Rule 8(f) F. R. Civ. Proc. provides that: All pleadings shall be so construed as to do substantial justice.

Respectfully submitted,

ROBERT W. FRASER,
*Attorney for Petitioners.*

*Of Counsel:*

OTIS BABCOCK,

ISAAC WILLSON.

## APPENDIX A.

### Opinion of the United States Court of Appeals.

United States Court of Appeals, Tenth Circuit. No. 6580, March Term, 1961.

Fred K. Wagoner, Jack R. Wagoner, Donald L. Wagoner and Howard R. Wagoner, co-partners doing business under the firm name and style of Wagoner Construction Company, Appellants, v. Fairview Consolidated School District No. 5, George Sawhill, Charles Williams, 1st Doe and 2nd Doe, Appellees.

April 18, 1961.

Appeal from the United States District Court for the District of Colorado.

Isaac Willson (Otis Babcock was with him on brief) for Appellants.

Roger E. Stevens and William A. Trine (Charles E. Williams was with them on brief) for Appellees.

Before Murrah, Chief Judge, Pickett, Circuit Judge and Savage, District Judge.

Per Curiam.

The plaintiff-appellants are here seeking an appeal from the order of the District Court dismissing their complaints.

The record discloses that the court entered its order dismissing the actions on July 20, 1960. A motion for new trial was filed more than 10 days thereafter and over-ruled on the same date. The Clerk of the District Court received plaintiffs' notice of appeal on September 3, 1960, and more than 30 days from the date of the order of dismissal.

Rule 59(b) F. R. Civ. P. states that "a motion for new trial shall be served not later than 10 days after the entry of the judgment." And, Rule 73(a) states that a notice of appeal shall be filed within 30 days from the entry of the judgment or within 30 days from an order denying a motion for new trial. And, a timely notice of appeal is a jurisdictional prerequisite. Martin v. United States, 263 F. 2d 516; Lobato v. Pay Less Drug Stores, 261 F. 2d 406; Stone v. Wyoming Supreme Court, 230 F. 2d 275; Schlink v. C&O Ry. Co., 276 F. 2d 116. Here the notice of appeal was filed within 30 days from the denial of the motion for new trial, but since the motion for the new trial was untimely, it did not extend the time for taking the appeal. See 7 Moore's Federal Practice §73.09(4), p. 3142; Lujan v. United States, 204 F. 2d 171.

Apparently the plaintiffs did notify the District Court Clerk, prior to the expiration of the 10-day period, that it was their intention to file a motion for new trial. However, the motion was not filed within that period and an intention to file it is ineffectual to extend the time for appeal.

The appeal mustt herefore be dismissed for lack of jurisdiction.

Robert B. Cartwright, Clerk, United States Court of Appeals, Tenth Circuit.

[Seal] /s/ ROBERT B. CARTWRIGHT.

## EXHIBIT "A."

### Designation of Record on Appeal.

Civil No. 6338

Filed United States District Court, Denver, Colorado, Oct. 5, 1960, G. Walter Bowman, Clerk.

To the Clerk of the above-entitled Court:

You are respectfully advised that the following items are designated by plaintiff and appellant for record on appeal herein:

a) First amended complaint;

b) Notice of appeal;

c) Notice to Clerk to prepare Clerk's Transcript;

d) Motion of defendants, Fairview Consolidated School District No. 5, George Sawhill, Charles Williams, 1st Doe and 2nd Doe to dismiss the above-entitled action;

e) Order of the Court made and entered July 20th, 1960, dismissing the above-entitled action as to defendants, Fairview Consolidated School District No. 5, George Sawhill, Charles Williams, 1st Doe and 2nd Doe.

[Ex. "A," Supp Tr. of Rec. p. 1.]

Affidavit of Service deleted.

Respectfully submitted,

ISAAC WILLSON and
OTIS BABCOCK,
By OTIS BABCOCK,

*Attorneys for Plaintiffs and Appellants.*

## EXHIBIT "B."

**Notice of Intention to Move for a New Trial and of Intention to Move for an Order to Alter or Amend Judgment.**

No. 6338

Filed United States District Court, Denver, Colorado, Jul. 29, 1960. G. Walter Bowman, Clerk.

To: Fairview Consolidated School District No. 5 and George Sawhill, Charles Williams, 1st Doe and 2nd Doe, individually as trustees of Consolidated School District No. 5; And To their attorneys, Williams, Stevens and Taussig:

You And Each Of You Will Please Take Notice, that the plaintiff intends to move the above-entitled Court to vacate and set aside the order and judgment made and entered herein on the 19th day of July, 1960, in favor of the said defendants and against the plaintiffs and to grant a new trial for said cause and for an order to alter or amend said judgment upon the following grounds materially affecting the substantial rights of the plaintiffs, to-wit:

(A) Insufficiency of the evidence to justify the order and judgment and that is against the law.

(B) Error in law occurring at the trial excepted by plaintiffs.

Said motion will be based upon this notice of motion, the Points and Authorities attached hereto and made a part hereof, upon all the records and files in

the above entitled action and upon the Minutes of the Court.

Dated: July 27th, 1960.

Affidavit of Service and Points and Authorities deleted.

[Ex. "B," Supp. Tr. of Rec. p. 2.]

ISAAC WILLSON and
OTIS BABCOCK,

By OTIS BABCOCK,
Otis Babcock

*Attorneys for said Plaintiffs.*

## EXHIBIT "C."

### Motion for New Trial and to Amend or Alter Judgment.

Filed United States District Court, Denver, Colorado, Aug. 8, 1960. G. Walter Bowman, Clerk.

To: Fairview Consolidated School District No. 5 and George Sawhill, Charles Williams, 1st Doe and 2nd Doe, individually as trustees of Consolidated School District No. 5; And To: Their attorneys, Williams, Stevens and Taussig:

You And Each Of You Will Please Take Notice, that the plaintiffs herein amend their notice of intention to move for a new trial and of intention to move for an order to alter or amend judgment heretofore filed herein and they do now move the above-entitled Court for a new trial and for an order to alter or amend said judgment herein upon the following grounds materially affecting the substantial rights of the plaintiffs, to-wit:

(A) Insufficiency of the evidence to justify the order and judgment and that it is against the law.

(B) Error in law occurring at the trial and excepted to by plaintiffs.

Said motion is based upon the Points and Authorities attached to the said Notice of intention to move for a new trial and of intention to move for an Order to alter or amend judgment, upon all the records and files

in the above-entitled action and upon the Minutes of the Court.

Dated: August 5th, 1960.

Affidavit of Service deleted.

[Ex. "C," Supp. Tr. of Rec. p. 8.]

ISAAC WILLSON and
OTIS BABCOCK,

By OTIS BABCOCK,
Otis Babcock

*Attorneys for said Plaintiffs.*

## EXHIBIT "D."

Law Offices
OTIS BABCOCK
1241A South Main Street
Santa Ana, California
KImberly 7-2218

March 25, 1961

Honorable Presiding Justice
and Associate Justices
United States Court of Appeal
Tenth Circuit
Federal Building
Denver, Colorado

In Re: Wagoner, et al v. Fairview Consolidated School District No. 5, et al. No. 6580.

Sirs:

Recently I received from Mr. Isaac Willson, attorney at law, my associate in the above entitled action, a letter stating that upon the oral hearing of said action last Tuesday, the court indicated that it, perhaps, did not have jurisdiction to hear and determine this case for the reason that the motion for a new trial had not been filed within the time required by law. The transcript of record on it's face shows this to be true, however, the facts are otherwise.

A notice of intention to move for a new trial and to amend or alter judgment was filed in the above entitled action on the 29th day of July, 1960, as shown by a copy of a letter received from Mr. G. Walter Bowman, Clerk of the United States District Court, District of Colorado, attached hereto; the original is in our files.

From the last paragraph of Mr. Bowman's letter, I understood that perhaps the document denominated no-

tice of intention to move for a new trial, was not sufficient under your rules for a motion for a new trial; hence, we did on the 8th day of August, file a motion for a new trial and to amend or alter judgment and to amend the said notice of intention to move for a new trial.

Our designation of record to be used on appeal did not include the notice of intention to move for a new trial nor the motion for a new trial for the reason that there was never any claim by appellees that a proper and timely motion for a new trial had not been made.

Under the circumstances, we respectfully request permission to augment the record on appeal by inserting therein the said notice of intention to move for a new trial filed July 29th, 1960, and the motion for a new trial and to amend the said notice of intention to move for a new trial filed on August 8th, 1960.

This office is at fault in not informing Mr. Willson that the notice of intention to move for a new trial had been filed; he had no knowledge of this at the time of the oral hearing.

Respectfully,

/s/ OTIS BABCOCK
Otis Babcock

OB:loy
Enclosure

A true copy:

Teste: United States Circuit Court of Appeals, Tenth Circuit.

/s/ ROBERT B. CARTWRIGHT
Robert B. Cartwright, Clerk.

Affidavit of Service deleted.

[Ex. "D," Supp. Tr. of Rec. p. 11.]

United States District Court
Office of The Clerk
District of Colorado

G. Walter Bowman, Clerk

456 P. O. Building
Denver 1, Colorado

July 29, 1960

Otis Babcock
Attorney at Law
1241 A South Main St.,
Santa Ana, California

Re: Civil 6338, Wagoner vs. Fairview Consolidated School District

Dear Mr. Babcock:

The receipt of your letter of July 27, 1960 is herewith acknowledged.

On July 29, 1960, I received your notice of intention to move for a new trial and to amend or alter judgment which I filed.

I am enclosing herewith your check in the sum of $10.00 which I am returning for the reason that no filing fee is required of the defendant.

Inasmuch as you denominated this document as a Notice of Intention to Move for a New Trial, does this mean that you will mail us another motion entitled "Motion for New Trial, and to Amend or Alter Judgment?

Very truly yours,
G. WALTER BOWMAN,
G. Walter Bowman, Clerk

Enc. (check)